89-2024

Supreme Court, U.S.
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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JOSE GERARDO MUNOZ-FABELA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether "possession with intent to distribute" is a predicate "drug trafficking crime" within the restrictive definition of 18 USC Section 924(c) (eff. 1986).

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v.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jose Gerardo Munoz-Fabela[1] petitions for issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

This case has been subject to two appeals to the Court of Appeals. The most recent decision and the one forming the basis for this petition was issued March 7, 1990,

1. The parties in the Court below were Jose Gerardo Munoz-Fabela as Appellant-Defendant and the United States as Appellee-Plaintiff.

and is unreported (Attachment A). The prior opinion of the Court of Appeals was issued November 18, 1988 and is unreported (Attachment B). The Judgment of the District Court is not reported (Attachment C).

JURISDICTION

The decision of the Court of Appeals which affirmed Petitioner's conviction was entered March 7, 1990. Petitioner did not seek rehearing. On June 5, 1990, Petitioner was granted an extension of time in which to submit his Petition to June 19, 1990. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 924(c) of Title 18 of the United States Code as amended in 1986 provides in relevant part:

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime, . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . .
>
> (2) For purposes of this subsection, the term "drug trafficking crime" means any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance . . .

18 USC Section 924(c) (Eff. 1986).

STATEMENT OF THE CASE

Petitioner was arrested by federal officers on June 2, 1987, for a transaction alleged to have occurred that day.

Petitioner and three co-defendants were charged in a three-count indictment arising from Petitioner's June 2, 1987 arrest. In Count One, Petitioner was charged with conspiracy to possess with intent to distribute a quantity of cocaine during the period from May 14, 1987 to June 2, 1987; in Count Two, Petitioner was charged with possession with intent to distribute cocaine; in Count Three, Petitioner was charged with distribution of a controlled substance within one thousand feet of an elementary school. Petitioner entered into a plea agreement under which the charges in Cause No. B-87-255 would be dismissed in exchange for Petitioner's plea of guilty to the offense of misprision of a felony. The plea bargain was approved by Court. Petitioner was sentenced on October 7, 1987, to three years imprisonment, the maximum sentence possible. Indictment No. B-87-255 was dismissed on that date.

On August 11, 1987, the government obtained the indictment (Attachment D) resulting in the conviction which is the subject of this petition, the indictment alleged that on June 2, 1987, Defendant "did . . . use or carry a firearm . . . during commission of a drug trafficking crime . . . that is, possessing with intent to distribute a quantity of cocaine" in violation of 18 USC Section 924(c)(1) (eff. 1986). The base offense charged in the indictment—possession with intent to distribute on June 2, 1987—is the precise offense charged in Count Two of Indictment No. B-87-255.

Petitioner filed a Motion To Dismiss Pursuant to Plea of Double Jeopardy. The trial court overruled the motion to dismiss. Petitioner gave timely notice of appeal. The Court of Appeals affirmed the trial court's action.

On remand, trial was before a jury. At the close of the government's case in chief, Petitioner moved for judgment of acquittal. The trial court denied Petitioner's motion. The jury returned a verdict of guilty. Petitioner was sentenced to the mandatory 5 year period of imprisonment required by 18 USC Section 924(c).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Fifth Circuit is inconsistent with this Court's Opinions requiring strict construction of penal provisions in favor of lenity.

Petitioner was charged and convicted of an activity which does not constitute an offense under the statute which provides the basis for the charge. The indictment fails to allege an offense under 18 USC Section 924(c)(1) for the simple reason that "possession with intent to distribute" is *not* a drug trafficking offense within the meaning of 18 USC Section 924(c)(1) (eff. 1986).[2]

The principles of statutory construction which must be applied in defining the reach of Section 924(c) are well established. Determination of the reach of a criminal offense statute is governed by the traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved. It is axiomatic that ambiguity concerning the ambit of criminal statutes must be resolved in favor of lenity. *Hughey v. United States*, ____ U.S.____, 110 S.Ct. 1079 (1990); *Crandon v. United*

2. 18 USC Section 924(c)(2) has been amended to expand the definition of drug trafficking crime.

States, 494 U.S. ____, 110 S.Ct. 997 (1990). Courts are reluctant to increase or multiply punishments absent a clear and definite legislative directive.

The history of judicial construction of 924(c) and the legislative response is instructive on the application of the controlling principles of statutory construction. The legislature has twice amended section 924(c) in response to shortcomings and ambiguities noted by the courts. In *Simpson v. United States*, 435 U.S. 6, 90 S.Ct. 909 (1978) and *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747 (1980), the Supreme Court concluded that section 924(c) was ambiguous regarding application of section 924(c) to crimes of violence proscribed by statutes which themselves provided for enhanced punishment for offenses committed with a dangerous weapon. In *Simpson* and *Busic*, the Court held that the enhancement provision of Section 924(c) could not be invoked in connection with statutes allowing for enhanced punishments for offenses committed with a dangerous weapon. In 1984, Section 924(c) was amended to provide a mandatory determinate sentence for any person who uses or carries a firearm in relation to any crime of violence including those crimes which already carry an enhanced penalty if committed with a dangerous weapon. 18 USC Section 924(a) (1984 Amendment).

The 1984 version of section 924(c) applied only in the case of a federal "crime of violence." Under 18 USC Section 16, a crime of violence is a federal felony which, by its nature, involves a substantial risk that violence may be used against people or property. In construing the 1984 version of Section 924(c), the court of appeals concluded that drug trafficking offenses were not inher-

ently crimes of violence and, for that reason, did not come within the coverage of the 1984 version of Section 924(c). *United States v. Diaz*, 778 F.2d 86 (2nd Cir. 1985); *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1631 (1987).

In 1986, Section 924(c) was amended to provide an enhanced punishment to anyone using a firearm "during and in relation to any crime of violence or drug trafficking crime." 18 USC Section 924(c)(1). Section 924(c)(2) defined "drug trafficking crime" for purposes of 924(c)(1) as meaning "any felony violation of federal law involving the *distribution, manufacture*, or *importation* of any controlled substance." 18 USC Section 924(c)(2) (Emphasis added). Distribution and manufacture of a controlled substance are offenses under 21 USC Section 841(a)(1) which makes it illegal "to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense a controlled substance". 21 USC Section 841(a). *Cf. United States v. Roberts*, 747 F.2d 537 (9th Cir. 1984); *Compare, United States v. Palafox*, 764 F.2d 558 (1985); *United States v. Faymore*, 736 F.2d 328 (6th Cir.), *cert. denied* 469 U.S. 868 (1984).

Possession, distribution, importation and manufacture are distinct offenses. In defining "drug trafficking crimes" as federal crimes involving "distribution, manufacture, or importation of any controlled substance", Congress limited the application of Section 924(c) to those specific drug offenses. Congress did *not* include any form of possession within the definition of "drug trafficking crimes." Had Congress wished to include possession or to include other offenses proscribed in Section 841(a)(1) within the scope of "drug trafficking crimes" under the 1986 version of

924(c), it could have done so easily as it did in the 1988 amendment to Section 924(c)(2).[3]

"When Congress has the will, it has no difficulty in expressing its will that a consecutive sentence be imposed under Section 924(c) when the underlying offense contains an enhancement provision. Congress did not clearly express its will regarding how the statute should be applied in situation such as [this case]." *United States v. Chalan,* 812 F.2d 1302, 1317 (10th Cir. 1987). Where there is no clear expression of congressional will, a penal statute must be "strictly construed against the government or parties seeking to exact criminal penalties and in favor of persons on whom such penalties are sought to be imposed." *Sutherland Statutory Construction,* Section 59.03, at 6-7 (4th ed. 1984). This result is in keeping with the "presupposition of our law to resolve doubts in the enforcement of a Penal Code against the imposition of a harsher punishment . . ." *Bell v. United States,* 349 U.S. 81, 83, 75 S.Ct. 620, 622 (1955).

The principle of strict construction requires the conclusion that possession with intent to distribute is not a drug trafficking offense under Section 924(c). In light of this, Petitioner's conviction should have been reversed. The Court of Appeals failed to apply the controlling rules of statutory construction and reached an erroneous conclusion. Review should be granted to ensure conformance with the guiding principles for statutory construction established by this Court and to prevent injustice.

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3. The 1988 version of Section 924(c)(2) provides that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substance Act, the Controlled Substance Import and Export Act or the Maritime Drug Enforcement Act". 18 USC Section 924(c)(2) (Amended 1988).

CONCLUSION

For the foregoing reasons, Petitioner asks that the Petition For Writ of Certiorari be granted.

Respectfully submitted,

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ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2492

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSE GERARDO MUNOZ-FABELA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(March 7, 1990)

Before HIGGINBOTHAM, JONES, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

A criminal defendant appeals, for the second time, his conviction pursuant to a statute that proscribes possession of a firearm during the commission of a drug-trafficking offense. Having already failed to establish that a separate prosecution for possession of the firearm constitutes double jeopardy, he now advocates that the statute is an "enhanced penalty provision" that, in the absence of an

underlying drug-trafficking *conviction,* cannot provide an independent basis for punishment. On the basis of a prior opinion of this court, we conclude, however, that 18 U.S.C. § 924(c)(1) (West Supp. 1989) provides a separate basis for criminal liability. Further, there is no statutory requirement that the government secure an underlying drug-trafficking *conviction* as a predicate for invoking section 924(c)(1). Accordingly, we affirm.

I.

Defendant Jose Gerardo Munoz-Fabela (Munoz) was arrested by undercover agents from the Drug Enforcement Administration, who suspected him of providing protective surveillance for drug dealers conducting a cocaine transaction. The agents suspected Munoz of criminal complicity when he left a certain home in the company of a known drug courier; that courier had announced to the agents, moments before, that he had to retrieve the cocaine shipment from his source's home before consummating the deal.

Departing with the courier, Munoz operated a separate vehicle, followed in trace, and positioned the vehicle within visible proximity to the drug transaction taking place in a parking lot. The undercover agents observed that Munoz's attention was focused upon the participants in the transaction; they concluded that such activity was consistent with the practice among drug dealers of providing counter-surveillance against police intervention. The agents arrested the participants, including Munoz, who remained in his vehicle nearby. On the floorboard of Munoz's vehicle, and well within his view and reach, rested a loaded 9 mm. pistol.

Munoz was indicted on June 16, 1987, for conspiracy to possess cocaine with intent to distribute, possession of cocaine with intent to distribute, and distribution thereof. Thereafter, on August 11, 1987, Munoz was separately indicted for knowingly and intentionally using or carrying a firearm during and in relation to a drug-trafficking crime under section 924(c)(1). As to the first indictment, a plea bargain was reached with the government whereby Munoz agreed to plead guilty to the charge of "misprison of a felony" in exchange for the dismissal of the first indictment. The plea-bargain agreement, however, was silent concerning the second outstanding indictment.

Munoz received a three-year prison term as a consequence of his misprison conviction. Thereafter, he challenged the government's ability to prosecute the independent weapons charge on the basis that he would be placed twice in jeopardy. In an interlocutory appeal, we found no double jeopardy bar impeding the government's ability to prosecute the second indictment pursuant to section 924(c)(1). *See United States v. Munoz-Fabela,* 861 F.2d 1278 (5th Cir. 1988) (per curiam) (unpublished). Thereafter, Munoz was convicted of violating section 924(c)(1) and received the *mandatory* five-year consecutive prison sentence provided by that section.

II.

A.

Munoz understands section 924(c)(1) to provide no independent basis for criminal liability absent an underlying drug-trafficking conviction. He alleges that the statute is simply a penalty-enhancement provision. A guilty

plea for misprison with respect to a separate indictment, the argument proceeds, does not qualify as the type of predicate act envisioned by section 924(c)(1) and therefore does not invoke the mandatory five-year sentence.

The government objects to Munoz's interpretation of the statute, arguing that he misconstrues the plain language of section 924(c)(1); specifically, the statutory language does not require an underlying *conviction*, but only that the weapon be used or carried in furtherance of a drug-trafficking offense for which the government *could have prosecuted* The government argues that the section provides independent criminal liability, as evidenced by its legislative history. Both the government and Munoz cite the legislative history of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 1976, 2138-39, extracting from it portions that supposedly bolster the persuasiveness of their respective positions. *See, e.g.*, 1984 U.S. Code Cong. & Admin. News 3182, 3490-92.

Further, Munoz reminds us that we have previously construed another subsection of this statute, section 924 (e)(1), as a sentence-enhancement provision. *See United States v. Quintero*, 872 F.2d 107, 110 (5th Cir. 1989), *petition for cert. filed* (June 15, 1989) (No. 88-7509); *United States v. Affleck*, 861 F.2d 97, 99 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1325 (1989). Munoz suggests that the same determination should be reached here with respect to section 924(c)(1) in light of the fact that section 924 is broadly styled "Penalties."

We need not resolve these arguments, however, as a recent, prior panel of this court has decided the issue at hand. In *United States v. Wilson*, 884 F.2d 174, 176

& n. 2 (5th Cir. 1989), we affirmed a separate conviction under section 924(c)(1), thus establishing that that section constitutes an independent basis for criminal liability. Also in *Wilson*, we rejected the government's assertion that the defendant's guilty plea in *state* court was sufficient to establish a predicate drug trafficking offense under 21 U.S.C. § 841(a)(1); the government thus had to present evidence of the underlying offense.

Importantly, therefore, it is only the fact of the offense, and not a conviction, that is needed to establish the required predicate. Hence, in the instant case, the charge of possession of cocaine with intent to distribute, contained in the first indictment, qualifies as a "drug-trafficking offense" under section 924(c)(1).

B.

Munoz also challenges the sufficiency of the evidence to sustain his firearms conviction under section 924(c)(1). He correctly argues that Congress did not intend to criminalize possession of firearms where the weapon played no role in the drug-trafficking offense. Indeed, section 924(c)(1) operates only in the narrow context of possession of a weapon "during and in relation to any . . . drug trafficking crime." The question thus becomes whether there is sufficient evidence to demonstrate that Munoz (1) used or carried a firearm during and in relation to (2) an underlying drug-trafficking crime.

When sufficiency challenges are raised on appeal, we are to view the evidence in a light most favorable to the government and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *United States v. Price,*

869 F.2d 801, 804 (5th Cir. 1989); *United States v. Kaufman*, 858 F.2d 994, 999 (5th Cir. 1988). Further, juries are correctly instructed that they need not dispense with their common-sense understanding of the natural tendencies and inclinations of human behavior. *United States v. Henry*, 849 F.2d 1534, 1537 (5th Cir. 1988).

We have construed possession "during and in relation to" a drug-trafficking crime to mean that the weapon must have played "an integral part [in] the felony." *United States v. Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988); *United States v. Breckenridge*, 782 F.2d 1317, 1322-23 (5th Cir.), *cert. denied*, 479 U.S. 837 (1986). It is not necessary that the weapon be employed or brandished. *United States v. Boyd*, 885 F.2d 246, 250 (5th Cir. 1989); *United States v. Coburn*, 876 F.2d 372, 375 (5th Cir. 1989). "It is enough that the firearm was present at the drug-trafficking scene, that the weapon could have been used to protect or facilitate the operation, and that the presence of the weapon was in some way connected with the drug trafficking." *Boyd*, 885 F.2d at 250. The weapon may be hidden (as in *Robinson*) or unloaded (as in *Coburn*).

Munoz argues that he did not own the weapon or know of its location under the front seat of the vehicle. He places great significance on the fact that the government did not complete a fingerprint analysis of the pistol and that the weapon was registered in the name of a third person. As we declared in *Robinson*, however, the statute focuses upon possession and not ownership. 857 F.2d at 1010. In light of our precedents, a loaded gun placed upon a vehicle floorboard, within view and reach of the occupant providing surveillance for a drug transaction,

satisfies the requirement that the weapon have been used or carried "during and in relation to" drug-trafficking crime.

Separately, Munoz believes the government's evidence fell short of demonstrating, beyond a reasonable doubt, that he committed an underlying drug-trafficking offense. We conclude, however, that a reasonable jury could have concluded that Munoz aided and abetted the crime of possession of cocaine with intent to distribute; namely, providing surveillance and security for the principal participants of the drug transaction. In *Robinson*, we held that possession with intent to distribute constitutes a predicate drug-trafficking offense. Further, aiding and abetting a crime renders one liable to the same extent as the principals. 18 U.S.C. § 2(a).

In this case, the government demonstrated Munoz's complicity by showing that he left a suspected dealer's home in the company of a drug courier. Munoz then positioned his vehicle in close proximity and focused upon the activities of the courier while the sale was consummated. He was then arrested with a loaded gun on the floorboard. We conclude that a reasonable jury could have been convinced, beyond a reasonable doubt, that Munoz provided surveillance services in furtherance of the crime of possession of cocaine with intent to distribute.

AFFIRMED.

ATTACHMENT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2092

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSE GERARDO MUNOZ-FABELA,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-B-87-349-01)

(November 18, 1989)

Before REAVLEY, HIGGINBOTHAM, and SMITH, Circuit Judges.

PER CURIAM:*

Jose Gerardo Munoz Fabela was indicted for violations of the drug trafficking laws. He was separately indicted for carrying a firearm during the commission of a drug

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

trafficking crime. Pursuant to a plea agreement, Fabela pled guilty to misprision of a felony and the district court dismissed the indictment for drug trafficking crimes in accordance with the government's agreed recommendation. The second indictment containing the firearm charge was not mentioned in the plea bargain.

Fabela later moved to dismiss the second indictment claiming that it failed to allege an offense and that its trial would twice put him in jeopardy. The district court denied Fabela's motion.

On appeal, Fabela contends that his right to not be put in double jeopardy protects him from prosecution for the firearm offense since the lesser-included offense, the drug trafficking crime, had been dismissed pursuant to a plea bargain. We are not persuaded. Jeopardy does not attach to charges dismissed as part of a plea bargain. *See United States v. Vaughn,* 715 F.2d 1373, 1376-77 (9th Cir. 1983).

AFFIRMED.

ATTACHMENT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Court Sitting in McAllen, Texas

JUDGMENT IN A CRIMINAL CASE

Case Number: B-87-349-01

UNITED STATES OF AMERICA

v.

JOSE GERARDO MUNOZ-FABELA

Tony Canales
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF: not guilty as to count 1 on August 19, 1987.

THERE WAS A: verdict of guilty as to count 1 on March 14, 1989.

THE DEFENDANT IS CONVICTED OF THE OFFENSE OF: USING OR CARRYING A FIREARM DURING THE COMMISSION OF A DRUG TRAFFICKING OFFENSE, IN VIOLATION OF 18 USC 924(c)(1), AS CHARGED IN THE ONE-COUNT INDICTMENT.

OFFENSE COMMITTED: June 2, 1987.

IT IS THE JUDGMENT OF THIS COURT THAT: THE DEFENDANT BE COMMITTED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR A

PERIOD OF FIVE (5) YEARS, SAID SENTENCE TO RUN CONSECUTIVELY TO THE SENTENCE IMPOSED IN B-87-255-S1.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

April 21, 1989
Date of Imposition of Sentence

/s/ RICARD H. HINOJOSA
Signature of Judicial Officer

Honorable Ricardo H. Hinojosa
U. S. District Judge
Name and Title of Judicial Officer

4/26/89
Date

ATTACHMENT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

CRIMINAL NO. B-87-349

UNITED STATES OF AMERICA

v.

JOSE GERARDO MUNOZ-FABEL

INDICTMENT

THE GRAND JURY CHARGES:

That on or about June 2, 1987, within the Southern District of Texas, and within the jurisdiction of this Court, JOSE GERARDO MUNOZ-FABEL did knowingly and intentionally use or carry a firearm, to wit: a Tranfoglio, 9mm pistol, serial number H01116, during the commission of a drug trafficking crime of violation of Sections 841(a)(1) and 841(b)(1)(B), Title 21, United States Code, that is, possessing with intent to distribute a quantity of cocaine, in violation of Section 924(c)(1), Title 18, United States Code.

A TRUE BILL:

/s/ JENNY L. GARZA
Foreman of the Grand Jury

HENRY K. ONCKEN
United States Attorney

/s/ JACK WARD
Assistant United States Attorney